

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 19-cv-3171

ROCKY MOUNTAIN WILD, INC., a Colorado non-profit corporation;

Plaintiff,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT, a federal agency;
UNITED STATES DEPARTMENT OF INTERIOR, a federal agency;

Defendants.

COMPLAINT

I. INTRODUCTION

1. This suit seeks to remedy violations of the statutory rights of Rocky Mountain Wild (“RMW” or “Plaintiff”) caused by the Defendants United States Bureau of Land Management (“BLM”) and United States Department of Interior (“DOI”) for failing to comply with the statutory deadlines for responding to a request for documents made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* Instead of fully complying with the written FOIA request, Defendants have arbitrarily provided incremental responses and confirmed the continued, unlawful withholding of agency records, in violation of FOIA’s mandatory deadlines that implement the congressionally imposed duty to provide prompt public access to public records.

2. The ongoing FOIA violations by Defendants have prejudiced Plaintiffs ability to fully participate in ongoing federal land management decisions, including the National Environmental

Policy Act (“NEPA”) processes for the Tres Rios Resource Management Plan (“RMP”) Area of Critical Environmental Concern (“ACEC”) Amendment Process, which negatively impacts the interests of RMW’s members. Federal public land decisionmaking in Colorado involves arbitrary and capricious circumstances, including an established pattern where the BLM and DOI, with assistance of agency counsel, denies RMW’s request for FOIA access to agency records until the public no longer has a formal role in the decisionmaking.

3. Plaintiff’s FOIA request seeks information in agency records about ACEC designation decisions that will affect the federally listed Gunnison sage-grouse, other protected species, and federal public lands generally. This information was sought, in part, to inform Plaintiff’s Protest, which was due on October 16, 2019. BLM and DOI bureaucrats withhold agency records from Plaintiff, in part, to limit access to information that in turn, reduces the issues that Plaintiff can raise in the Protest. By withholding records responsive to RMW’s FOIA requests through delay and other unlawful conduct, BLM and DOI bureaucrats (with the assistance of counsel) arbitrarily limit the scope of administrative review and judicial review of their decisions. If Plaintiff’s Protest is denied and the proposed decision is finalized, the only means of challenging this action are through an Interior Board of Land Appeals process or Federal Court action. The information being withheld by Defendants is time sensitive and will help inform RMW in pursuing either of these specific courses of action, and more generally, RMW’s participation in federal public land management.

4. By violating FOIA, Defendants have violated Plaintiff’s rights to timely access agency records, a statutory right that the FOIA requester enjoys regardless of the purpose.

5. The circumstances involve arbitrary and capricious FOIA violations and withholding of agency records that denies Plaintiff's access to agency records necessary to prepare a meaningful Protest to the agency's RMP amendment decision, which includes violations of the National Environmental Policy Act and the Endangered Species Act. The withholding of agency records not subject to a recognized FOIA exemption is part of Defendants' pattern, practice, and/or policy of violating FOIA to avoid disclosure of Defendants' violation of federal laws that impose civil and criminal liability on Defendants, and its staff.

6. Plaintiff is currently challenging in Federal Court Defendants' unlawful handling of two similar FOIA requests seeking information about the Tres Rios Field Office's March 2017 and March 2018 Colorado Lease Sales. *See Rocky Mountain Wild v. BLM*, 17-cv-00636-PAB-NYW and *Rocky Mountain Wild v. BLM*, 18-cv-00314-WJM-STV. The Lease Sale FOIA requests involve federal public lands managed by the Tres Rios Field Office and agency actions that affect Endangered Species Act listed species, including the Gunnison sage-grouse. The violations alleged in the pending case further confirm the Defendants' policy, pattern, and practice of violating FOIA's timing provisions and denying Plaintiff the opportunity to be an informed participant in the agencies' decisionmaking process.

II. JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552 et seq. (FOIA), and 28 U.S.C. §1331 (federal question). The District Court "shall determine the matter de novo" and has broad discretion to structure judicial review of the case. 5 U.S.C. §552(a)(4)(B).

8. Venue in this Court is proper. 5 U.S.C. §552(a)(4)(B). Plaintiff is a Colorado non-profit corporation that resides in Denver, Colorado. Plaintiff filed the FOIA request at issue. The focus

of this FOIA request is ongoing federal land management by the Tres Rios Field Office in Colorado. All documents requested by Plaintiff concern issues related to and/or activities conducted by the Federal Government predominately in Colorado.

9. The failure to make a lawful determination on Plaintiff's May 15, 2019 FOIA request within twenty (20) working days is construed as a denial and waives further exhaustion of administrative appeals that ordinarily apply in FOIA cases. 5 U.S.C. §552(a)(6)(A)(i); 5 U.S.C. §552(a)(6)(C)(i).

10. Constructive exhaustion of administrative remedies vests this District Court with jurisdiction to resolve all issues regarding Plaintiff's FOIA request. 5 U.S.C. §552(a)(6)(C)(i) ("Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.").

11. This Court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Defendants are federal agencies that have improperly withheld agency records.

12. This Court has statutory authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has statutory authority to grant injunctive relief pursuant to 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B). The Court retains its full equitable powers to fashion and impose effective remedies for agency FOIA violations. The Court has equitable authority to remedy an agency policy, pattern, and/or practice that violates FOIA's

statutory requirements. Congressional concern over agencies' repeated, routine, carte blanche agency violations of FOIA deadlines is consistent with the lack of FOIA restrictions on the judicial power to enforce FOIA.

13. This Court has statutory authority to refer the matter to the Special Counsel to investigate and remedy circumstances involving potentially arbitrary and capricious practices of withholding agency records by violating FOIA mandates that agencies provide prompt access to agency records. 5 U.S.C. § 552(a)(4)(F).

14. "In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member." 5 U.S.C. § 552(a)(4)(G).

15. The FOIA claims made in this Complaint are ripe for judicial review and Plaintiff's harms can be remedied by an order of this Court.

III. PARTIES

16. Plaintiff, ROCKY MOUNTAIN WILD (RMW) is a Colorado non-profit corporation located in Denver, Colorado. RMW's mission is to conserve wildlands for wildlife through protecting, connecting and restoring habitat throughout the Southern Rockies. RMW regularly uses FOIA as an important avenue for gaining information about agency activities, and is harmed when it is denied documents to which it is entitled. RMW intends to continue its use of FOIA to access agency records in the possession of Defendants. In fact, on October 3, 2019 RMW filed a subsequent FOIA request seeking more recent information about this same RMP ACEC amendment process. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. RMW uses FOIA to publicize activities of federal agencies and to

mobilize the public to participate in the management of public lands. RMW has been harmed by Defendants FOIA violations, and the inability to use agency records in the agency decisionmaking process. The withholding of records harms RMW and its members recreational, aesthetic, wildlife, and other interests in public lands, species and landscapes RMW seeks to protect by participating in federal public land management proceedings. Withholding agency records prevents Defendants' resource specialists, decisionmakers, and administrative judges from making informed decisions that protect RMW's interests. RMW intends to continue using FOIA requests to fulfill its oversight and advocacy role through scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. Any person who files a FOIA request is deemed to have standing to invoke the jurisdiction of the Federal Courts to carry out the judicial review provisions of FOIA. Plaintiff filed the FOIA request at issue. RMW has standing to bring this FOIA suit. RMW brings this action on its own behalf and on behalf of its adversely affected members.

17. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM") is a federal agency under the U.S. Department of Interior. The BLM is responsible for responding to FOIA requests, and is sued as a Defendant in this action. Among other things, the BLM failed to lawfully respond to Plaintiff's May 15, 2019 FOIA requests within twenty (20) working days. Responsive records may be located at all levels of the BLM, including local, regional and its Washington D.C. Offices. BLM is a federal agency that has improperly withheld agency records.

18. Defendant UNITED STATES DEPARTMENT OF INTERIOR ("DOI") is a federal agency. The DOI is responsible for responding to FOIA requests filed with BLM, and is sued as

a Defendant in this action. Among other things, the DOI failed to lawfully respond to Plaintiff's May 15, 2019 FOIA requests within twenty (20) working days. The Office of the Solicitor must be consulted before the Office of the Secretary or BLM may deny a FOIA request by withholding records responsive to a FOIA request. 43 C.F.R. §§ 2.23(c), 2.24(b)(5). When carrying out Defendants' FOIA duties involving FOIA Exemptions (5 U.S.C. 552(b)), the Office of the Solicitor is a DOI component agency that acts outside the capacity of an attorney providing legal advice to a client. DOI is a federal agency that has improperly withheld agency records.

19. As of the date of this filing, DOI and BLM possess, control, and are withholding, agency records responsive to Plaintiff's FOIA request.

IV. STATEMENT OF FACTS AND SUMMARY OF LAW

20. RMW submitted a written FOIA request to Defendants on May 15, 2019. *Ex. 1* ("FOIA Request"). The FOIA Request was assigned control number BLM-2019-00726/CO-19-028. The 20 working-day FOIA deadline expired on June 14, 2019 without a direct response from Defendant.

21. An initial Response was provided to Plaintiff on August 19, 2019. *Ex. 2*.

22. A second Response was provided to Plaintiff on October 15, 2019. *Ex. 3*.

23. Neither the August 19, 2019, nor the October 15, 2019 Responses provided an estimate of a date by which the final FOIA determination would be issued. Neither Response provided an estimate of the date by which all responsive records not subject to lawful withholding would be released. Plaintiffs were informed that "[w]e are still reviewing additional records that are responsive to your request and will follow with further installments." *Ex. 3*.

24. Defendants have not provided a lawful final determination on the May 15, 2019 FOIA request. FOIA contains no provision allowing an agency to issue a partial determination. Appeals are not required where an agency opts to issue a series of *ultra vires* partial determinations.

25. FOIA was amended in 2007 to reaffirm that Congress, through FOIA, continues to seek to “ensure that the Government remains open and accessible to the American people and is always based not upon the ‘need to know’ but upon the *fundamental ‘right to know.’*” Pub. L. No. 110-175, 121 Stat. 2524, Section 2 ¶6 2007) (*emphasis supplied*).

26. This lawsuit is necessary based on the BLM’s failure to make a determination on Plaintiff’s FOIA request within twenty (20) working days. 5 U.S.C. §552(a)(6)(A)(i). Under “unusual circumstances”, an agency may extend that deadline by 10 working days. 5 U.S.C. §552(a)(6)(B). Even if “unusual circumstances” are present in this case; Defendants still are in violation of statutory deadlines.

27. Defendants have engaged in an ongoing policy, pattern, and/or practice of failing to assign the necessary resources to meet FOIA’s statutory deadlines. Defendants have access to the necessary resources to meet FOIA’s statutory deadlines. BLM arbitrarily and capriciously elects to allocate its resources to agency activities and actions that do not involve statutory deadlines; as opposed to the deadlines imposed by FOIA. BLM has a pattern, practice, and/or policy of allocating inadequate resources to its FOIA personnel to avoid public scrutiny of controversial BLM decisions involving public lands. The BLM and DOI components involved in this lawsuit have engaged in an ongoing pattern, practice and/or policy of unlawfully withholding records from RMW that address the agency’s statutory duties under various public

land management laws. BLM and DOI's pattern, practice and/or policy involves concealment of conduct regulated by environmental laws with criminal penalty provisions (e.g. Endangered Species Act, National Historic Preservation Act). Defendants' decision to underfund BLM's FOIA program involves circumstances that raise questions of whether agency personnel acted arbitrarily or capriciously when withholding agency records responsive to the FOIA request.

28. FOIA provides that when a Court compels improperly withheld agency records and assesses reasonable attorney fees and other litigation costs against the United States, that "the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to [the] withholding . . ." 5 U.S.C. § 552(a)(4)(F). Plaintiff is aware of litigation that alleged similar circumstances and a pattern of conduct surrounding record withholding and FOIA violations by the Farmington, New Mexico BLM Field Office. The allegations in that case were sufficient for a finding that the "**pattern and practice** claim will now go forward and a status conference will be convened to discuss and establish procedures to be followed." The *San Juan Citizens All., Inc. v. BLM*, 2018 U.S. Dist. LEXIS 147187, at *35 (D. Colo. Aug. 29, 2018). The *San Juan Citizens All.* case settled without a ruling on the merits of the "pattern and practice claim."

29. RMW alleged almost identical circumstances and a pattern of conduct against BLM in pending cases challenging the handling of an October 2016 FOIA request and an October 2017 FOIA request. *See Rocky Mountain Wild v. BLM*, 17-cv-00636-PAB-NYW and *Rocky Mountain Wild v. BLM*, 18-cv-00314-WJM-STV. Three additional FOIA requests involve a similar practice of administrative agencies represented by the Colorado United States Attorney's Office delaying FOIA compliance until agency decisionmaking was complete. The pattern of conduct was used

by the Forest Service to deny RMW access to agency records during administrative processes.

Rocky Mountain Wild v. Forest Service, 14-cv-02496-WYD-KMT; *Rocky Mountain Wild v. Forest Service*, 15-cv-00127-WJM, and *Rocky Mountain Wild v. Forest Service*, 18-cv-03065-MEH. The violations alleged in this Complaint, in conjunction with the violations alleged in previous and ongoing litigation, demonstrate circumstances that raise questions about the Defendants' arbitrary and capricious treatment of FOIA requests.

30. This lawsuit requests an order declaring that Defendants violated FOIA, declaring that Defendants continue to violate FOIA, directing Defendants to immediately issue determinations on Plaintiff's May 15, 2019 FOIA request, directing Defendants to search all locations noted in Plaintiff's May 15, 2019 FOIA request, and directing all requested records not subject to a FOIA Exemption be provided by a date certain. This lawsuit seeks judicial resolution and remedy of all FOIA-related issues that may arise during this litigation, including but not limited to, the adequacy of the search and any *post hoc* assertions of FOIA Exemptions involving the withheld records. Plaintiff also requests the Court use its equitable powers to enjoin BLM from going forward with the proposed RMP ACEC amendment decision, or otherwise committing federal resources to matters addressed in the FOIA request until such time that Plaintiff has had the benefit of reviewing the withheld records.

31. Plaintiff requests an order, findings, and/or referral that remedies the pattern, practice, and/or policy of the individual and agency actors in the executive branch who deny RMW's statutory FOIA right of prompt access to agency records during the administrative proceedings involving federal public land in Colorado.

V. FIRST CLAIM FOR RELIEF

Violation of the Freedom of Information Act: *Defendant has Unlawfully Withheld Agency Records which Plaintiff requested pursuant to FOIA.*

32. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

33. Defendants have violated one or more FOIA deadlines.

34. Defendants have issued partial responses that unlawfully withhold agency records requested by Plaintiff's May 15, 2019, request for agency records.

35. Defendants continue to violate FOIA (5 U.S.C. §552(a)) by failing to provide a lawful determination to Plaintiff's May 15, 2019, request for agency records within the statutory period.

5 U.S.C. §552(a)(6)(A)(i).

36. Defendants continue to violate FOIA by failing to conduct a lawful search for responsive records, which is a condition precedent to a lawful determination.

37. Defendants continue to violate FOIA by illegally withholding agency records that are responsive to the May 15, 2019 request for records, but which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

38. Defendants' use of partial responses instead of a lawful determination within the statutory period is arbitrary and capricious. 5 U.S.C. § 552(a)(4)(F).

VI. SECOND CLAIM FOR RELIEF

Violation of the Freedom of Information Act: *Defendants' conduct Raises Questions of Arbitrary and Capricious Actions When Defendants Unlawfully Withheld Agency Records that Plaintiff Requested Pursuant to FOIA.*

39. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

40. Defendants conduct in withholding agency records responsive to the FOIA request involves circumstances that raise questions on whether agency personnel acted arbitrarily or capriciously when imposing administrative deadlines on Plaintiff and taking agency action not constrained by statutory deadlines while violating Plaintiff's rights involving timely FOIA access to agency records.

41. Defendants' conduct is properly addressed by referral to Special Counsel for further investigation and remedy of the arbitrary and capricious conduct. 5 U.S.C. § 552(a)(4)(F). Plaintiff would benefit from the rational isolation of a particular evil in the present case for mandatory investigation - BLM and DOI bureaucrats (and their counsel) arbitrarily denying requests for copies of documents sought for use during a public comment period.

VII. THIRD CLAIM FOR RELIEF

Violation of the Freedom of Information Act: *Equitable Remedy of Violation of Freedom of Information Act – Defendants' Policies, Patterns, and Practices Unlawfully Withhold Agency Records Requested by Plaintiff.*

42. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

43. Defendants have a pattern and practice of not complying with FOIA's statutory requirements in a timely manner.

44. Defendants have a policy, pattern, and practice of violating FOIA by illegally withholding agency records that are responsive to FOIA requests by delaying the processing of agency records that are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

45. Defendants have a policy, pattern, and practice of violating FOIA by illegally withholding agency records that are responsive to FOIA requests, but which are not subject to any FOIA withholding provision. 5 U.S.C. § 552(b).

46. Plaintiff's interests in public lands and wildlife, and the ability to engage in the public participation component of Defendants' decision regarding designation or a failure to designate BLM lands as ACECs has been harmed, and can be remedied by enjoining Defendants from moving forward with this decision, reopening all of Defendants' administrative appeal deadlines that accrued after the May 15, 2019 FOIA deadline for a reasonable period of time to allow Plaintiff to participate in mandatory agency decisionmaking processes with the benefit of the information and knowledge provided by the requested agency records.

VI. REQUEST FOR RELIEF

FOR THESE REASONS, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

- A. Declare that Defendants have violated FOIA by unlawfully withholding agency records responsive to Plaintiff's May 15, 2019 request for records;
- B. Declare that Defendants' violated its duty to comply with FOIA's statutory deadlines;
- C. Enter a finding that Defendants' conduct involves circumstances that raise questions of whether the agency has unlawfully, arbitrarily, and/or capriciously withheld agency records, and refer the matter for administrative investigation and remedy (5 U.S.C. § 552(a)(4)(F));
- D. Direct by injunction that Defendants provide Plaintiff a lawful determination on its May 15, 2019 request for records by a date certain;

E. Direct by injunction that Defendants conduct a lawful search and provide Plaintiff with all responsive agency records by a date certain;

F. Direct by injunction, based on FOIA and the Court's equitable power, that Defendants shall avoid any action that would impact the BLM lands involved in the May 15, 2019 FOIA request until 45 days after Plaintiff's FOIA rights are satisfied by providing the currently withheld agency records;

G. Direct by injunction that BLM take no final agency action and fully protect proposed ACECs until 45 days after Plaintiff's FOIA rights are satisfied by providing the currently withheld agency records;

H. Grant Plaintiff's cost of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and

I. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED November 7, 2019:

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